A **AUDREY GERTRUDE DE SOUZA v. SUNWAY D'MONT KIARA SDN BHD**

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
MOHD ZAWAWI SALLEH JCA
B UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: B-02-2416-10-2012]
26 JANUARY 2015

C ***CONTRACT LAW:*** *Breach – Sale and purchase agreement, breach of – Use of wrong sale and purchase agreement – Effect of contravention of Housing Development (Control and Licensing) Regulations 1989 – Whether appellant's failure to pay balance of purchase price entitled respondent to terminate SPA – Whether contravention of Regulations went to substance of contract – Whether contravention rendered SPA null and void or voidable*

D On 29 July 2004, the appellant had entered into a sale and purchase agreement ('the SPA') with the respondent, a licensed housing developer, to purchase a property in Kiara Hills, upon which the respondent was to construct a bungalow unit with a courtyard, at the purchase price of RM4,464,050. Upon the execution of the SPA the appellant had duly paid E the respondent 10% of the purchase price as deposit. When the appellant failed to pay the progressive payments despite repeated reminders, the respondent exercised its right to terminate the SPA and to forfeit the appellant's deposit together with outstanding interest in accordance with the terms of the SPA. The appellant then filed a civil suit against the respondent F for an order that the SPA be declared void or alternatively voidable at the option of the appellant for being in violation of the Housing Development (Control and Licensing) Act 1966 ('the Act'). The appellant also claimed a return of the deposit she had paid with interest. The appellant submitted that under reg. 11(1) of the Housing Development (Control and Licensing) G Regulations 1989 ('the Regulations') the SPA should be in the form prescribed in Schedule H of the Regulations ('Form H') but the respondent had used the form prescribed in Schedule G of the Regulations ('Form G'), which was for landed property. As a result, the appellant argued that a strata title could not be issued for the bungalow and the title was encumbered. The H appellant also submitted that the respondent had induced her to enter into the Form H agreement and prevented her from seeking independent legal advice. In its defence the respondent submitted that the appellant was at all material times aware that Kiara Hills was a stratified development especially since her husband's company was the sole property agent for the Kiara Hills development. The respondent also submitted that the appellant had not I entered into the Form H agreement because of any representation made by it but rather from representations made by her husband. In any event it was

the respondent's case that the appellant's claim was premature and obviously unsustainable as the obligation on the part of the respondent to apply for the individual strata titles had not arisen and would arise only six months after the certificate of fitness for occupation was issued. As such, the respondent maintained that it was entitled to terminate the SPA and forfeit the deposit. The High Court found that although there had been a contravention of the Regulations, the use of the wrong form had not rendered the SPA void or voidable. The High Court dismissed the appellant's civil suit with costs. Hence the present appeal. It was an undisputed fact that the SPA in the circumstances of a bungalow with a courtyard should have been in Form G and not Form H and that in the present case the wrong form had been used. The main issue in the present appeal was whether the decision of the High Court warranted appellate intervention.

Held (dismissing appeal with costs)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) In this case, use of Form H instead of Form G was a contravention as to the form of the SPA to be used for the contract between the parties for the purchase of the bungalow and courtyard property. However, the contravention did not go to the substance of the contract. The mandatory language of reg. 11(1) of the Regulations prescribing the use of Form G or Form H did not extend to declaring that the contract under any other form other than Form G or Form H would render it null and void. Instead s. 22 provides that a contract was not voidable because it was caused by a mistake as to any law in force in Malaysia, such as when the wrong form was used. Since the contravention as to the form to be used did not affect the object of the contract between the parties, being the delivery of a bungalow with a courtyard on Lot 16 as contracted, the contravention did not render the contract between the parties to be null and void. (paras 17, 21, 22 & 25)

(2) Under s. 24 of the Act, the Minister was given the discretion to make the Regulations for the purpose of carrying into effect the provisions of the Act. The purpose of the Act was to provide for the control and licensing of the business of housing development in Peninsular Malaysia with provisions designed to protect the purchaser and to ensure delivery of the house or unit contracted for. As such, a decision to render the contract between the parties null and void because of a contravention of the Regulations would not serve the object of protecting the purchaser and ensuring delivery of the house in accordance with the contract. (paras 18 & 19)

(3) That the contravention rendered the contract voidable, although prayed for as an alternative order, was largely academic for the reason that there was no evidence adduced and not objected to that the appellant had terminated the Form H agreement on that ground. (para 23)

(4) The obvious solution available to the appellant in the present case was to either seek to terminate the Form H agreement and demand a refund or to execute an agreement in the correct form and to backdate its effectiveness to 29 July 2004 since payments had been paid. However, the appellant had observed neither option and failed or refused to make further payments towards the balance of the purchase price. Further, in the light of the assurance from the Ministry of Housing and Local Government that the law was being amended to allow for the issue of a stratified title for the bungalow with courtyard as contracted, the appellant's concern became both a premature and academic concern. (paras 31-35)

Bahasa Malaysia *Translation Of Headnotes*

Pada 29 Julai 2004, perayu telah memasuki satu perjanjian jual beli ('PJB') dengan responden, pemaju perumahan berlesen, untuk membeli sebuah hartanah di Kiara Hills, di mana responden bercadang untuk membina satu unit banglo dengan halaman, pada harga belian RM4,464,050. Dengan pelaksanaan PJB tersebut, perayu telah membayar 10% daripada harga belian tersebut kepada responden sebagai deposit. Apabila perayu gagal membayar bayaran berperingkat walaupun berulang kali diingatkan, responden menjalankan haknya untuk menamatkan PJB dan melupuskan deposit perayu bersama-sama dengan faedah tertunggak selaras dengan terma SPA. Perayu kemudiannya memfailkan satu guaman sivil terhadap responden bagi satu perintah agar PJB tersebut diisytiharkan tidak sah atau secara alternatifnya, boleh batal atas pilihan perayu kerana melanggar Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('Akta'). Perayu juga menuntut pemulangan deposit yang dibayar olehnya dengan faedah. Perayu menghujahkan bahawa di bawah peraturan 11(1) Peraturan Perumahan (Kawalan dan Pelesenan) 1989 ('Peraturan'), PJB mestilah dalam borang yang ditetapkan dalam Jadual H Peraturan ('Borang H') tetapi responden telah menggunakan borang yang ditetapkan dalam Jadual G Peraturan ('Borang G'), iaitu bagi harta tanah. Akibatnya, perayu menghujahkan bahawa hak milik strata tidak boleh dikeluarkan bagi banglo tersebut dan hak milik tersebut mempunyai kekangan. Perayu juga menghujahkan bahawa responden telah mendorongnya untuk memasuki perjanjian Borang H dan menghalangnya daripada mendapatkan nasihat guaman bebas. Dalam pembelaannya, responden menghujahkan bahawa perayu, pada setiap masa material, sedar bahawa Kiara Hills ada pembangunan yang distratakan memandangkan syarikat suaminya adalah satu-satunya agen hartanah bagi pembangunan Kiara Hills. Responden menghujahkan lagi bahawa perayu tidak memasuki perjanjian Borang H berdasarkan representasi yang dibuat olehnya tetapi kerana representasi-representasi yang dibuat oleh suaminya. Dalam apa jua keadaan, adalah menjadi kes responden bahawa tuntutan perayu adalah pramatang dan jelas tidak boleh dikekalkan kerana tanggungjawab pihak

responden untuk memohon hak milik individu strata tidak berbangkit dan akan berbangkit hanya enam bulan selepas sijil layak menduduki dikeluarkan. Dengan itu, responden menghujahkan bahawa ia berhak untuk menamatkan PJB dan melupuskan deposit. Mahkamah Tinggi mendapati bahawa walaupun terdapat percanggahan dengan Peraturan, penggunaan borang yang salah tidak menjadikan SPA terbatal atau boleh batal. Mahkamah Tinggi menolak guaman sivil perayu dengan kos. Oleh itu, rayuan ini. Adalah menjadi satu fakta yang tidak boleh disangkal bahawa PJB dalam hal keadaan banglo dengan halaman sepatutnya dalam Borang G dan bukan Borang H dan bahawa dalam kes ini, borang yang salah telah digunakan. Isu utama dalam rayuan ini adalah sama ada keputusan Mahkamah Tinggi mewajarkan campur tangan rayuan.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Dalam kes ini, penggunaan Borang H dan bukan Borang G adalah bertentangan dengan borang PJB yang harus digunakan untuk berkontrak antara pihak-pihak bagi pembelian hartanah banglo dan halaman. Walau bagaimanapun, percanggahan tersebut tidak ke akar umbi kontrak. Bahasa mandatori peraturan 11(1) Peraturan yang menetapkan penggunaan Borang G atau H tidak meliputi pengisytiharan bahawa kontrak di bawah borang lain selain daripada Borang G atau Borang H menjadikan ia batal dan tidak sah. Sebaliknya, s. 22 memperuntukkan bahawa satu-satu kontrak tidak menjadi boleh batal kerana ia disebabkan oleh kesalahan dalam mana-mana undang-undang yang berkuatkuasa di Malaysia, contohnya seperti apabila borang yang salah digunakan. Memandangkan percanggahan mengenai borang yang digunakan tidak memberikan kesan kepada objek kontrak antara pihak-pihak, iaitu penyerahan banglo dengan halaman di Lot 16 seperti yang dikontrakkan, percanggahan tidak menjadikan kontrak antara pihak-pihak batal dan tidak sah.

(2) Di bawah s. 24 Akta, Menteri diberikan budi bicara untuk membuat Peraturan bagi tujuan menguatkuasakan peruntukan-peruntukan Akta. Tujuan Akta adalah untuk memberi kawalan dan pelesenan perniagaan pemajuan perumahan di Semenanjung Malaysia dengan peruntukan-peruntukan yang digubal untuk melindungi pembeli dan memastikan penyerahan rumah atau unit yang dikontrakkan. Dengan itu, keputusan untuk menjadikan kontrak antara pihak-pihak batal dan tidak sah kerana percanggahan dengan Peraturan tidak akan memenuhi tujuan melindungi pembeli dan memastikan penyerahan rumah selaras dengan kontrak.

(3) Bahawa percanggahan menjadikan kontrak boleh dibatalkan, walaupun dipohon sebagai perintah alternatif, adalah sebahagian besarnya akademik kerana tiada keterangan yang dikemukakan dan tidak dibantah bahawa perayu telah menamatkan perjanjian Borang H atas alasan tersebut.

(4) Penyelesaian yang jelas buat perayu dalam kes ini adalah sama ada memohon untuk menamatkan perjanjian Borang H dan menuntut pemulangan bayaran atau melaksanakan perjanjian dalam borang yang betul dan berbalik kepada tarikh efektifnya iaitu 29 Julai 2004 sehingga pembayaran dibuat. Walau bagaimanapun, perayu tidak melaksanakan kedua-dua pilihan dan gagal atau enggan untuk membuat bayaran lanjut bagi baki harga belian. Selanjutnya, melihat pada jaminan yang diberikan oleh Kementerian Perumahan dan Kerajaan Tempatan bahawa undang-undang dipinda untuk membenarkan pengeluaran hak milik yang distratakan bagi banglo dengan halaman seperti yang dikontrakkan, kebimbangan perayu adalah pramatang dan merupakan kebimbangan akademik.

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat [1978] 1 LNS 15 FC ***(refd)***

CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd [2014] 9 CLJ 1012 FC ***(refd)***

Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC ***(refd)***

Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Act 1966, s. 24
Housing Development (Control and Licensing) Regulations 1989, regs. 11(1), 13
Malay Reservations Enactment 1933, ss. 13, 22
Rules of the High Court 1980, O. 23 r. 1

For the appellants - Dhanaraj Vasudevan (Kalai Selvi M & Devandra Balasingam with him); M/s Kamil Hashim Pury & Lim
For the respondents - P Jeyakumar (Thevini Nayagam with him); M/s Zahir Jeya & Zainal

Reported by Vani Krishnan

JUDGMENT

Abdul Wahab Patail JCA:

[1] The first plaintiff in the High Court, Audrey Gertrude De Souza ("the appellant") appealed against the dismissal with cost by that court of the civil suit commenced by the appellant together with four other plaintiffs, for orders, *inter alia*, as follows:

(a) A declaration that the sale and purchase agreement dated 29 July 2004 between the appellant and the respondent to be declared illegal and void for being in violation of the Housing Development (Control and Licensing) Act 1966;

(b) Alternatively, a declaration that the sale and purchase agreement dated 29 July 2004 between the appellant and the respondent, being in violation of the Housing Development (Control and Licensing) Act 1966 are voidable at the option of the appellant;

(c) The respondent to restore and/or to return to the appellants all monies received from the appellants with interest calculated at the rate of 10%; and

(d) The respondent to compensate the appellants by way of general damages or 10% of the purchase price whichever is higher.

[2] The background is briefly as follows:

(a) The appellant had purchased one unit of the bungalow in Kiara Hills to be erected by the respondent, a licensed housing developer as defined under the Housing Development (Control and Licensing) Act 1966 (the said Act) and the Housing Development (Control and Licensing) Regulations 1989 (the said Regulations), at the price of RM4,464,050.

(b) Under reg. 11(1) of the said regulations, the form prescribed in sch. G is for landed property while the form prescribed in sch. H is for a sub-divided building. But in this case, notwithstanding that the purchase is for landed property, the sale and purchase agreement executed on 29 July 2004 by the respondent was in Form H and not Form G as it should have been.

Decision In High Court

[3] The High Court, having briefly set out the background and the cases for the plaintiff and the defendant, and before making its findings, considered the issues:

(a) whether the defendant had made the alleged representations to the plaintiff to induce the plaintiff to enter into the sch. H agreement and whether the representations were misrepresentations;

(b) whether the plaintiff was prevented from seeking independent legal advice;

(c) whether the defendant encumbered the title without the plaintiff's consent; and

(d) whether the plaintiff's claim is *mala fide* and premature.

Decision Of This Court

[4] Having read the written submissions and heard the parties, we found no error, defect or irregularity in the findings that there was no inducement upon the appellant from the respondent to enter into the sch. H agreement, that the appellant had failed to prove that the respondent dissuaded her from obtaining independent legal advice, that the property upon which the bungalow with courtyard purchased was to be built was encumbered without the appellant's consent was baseless, and the plaintiff's claim was not *mala fide*. We found no error, defect or irregularity in the reasoning and decision

of the High Court as would affect the merits and thereby warrant appellate intervention as to whether by using sch. H, the sale and purchase agreement is illegal and void for being in violation of the said Act.

[5] Our reasons follow.

The Case For The Appellant

[6] We took into consideration the appellant's written submissions (AWS: para. 18ff) that its case was that:

(a) as a result of the use of Form H, the appellant was informed by her loan solicitors that strata title cannot be issued for the bungalow;

(b) seeking clarification from the respondent, the matter was referred to the relevant land authority who confirmed that:

(i) the development order granted was for a normal bungalow and not strata bungalow;

(ii) the relevant housing developer's license and advertising permit issued to the respondent was for a normal bungalow and not strata bungalow;

(iii) there is no provision in the Strata Titles Act 1985 (Act 318);

(c) though her housing loan was approved, it could not be released because of the issue as to validity of the sale and purchase agreement;

(d) a meeting on 14 November 2005 called by Pengarah Tanah dan Galian, Wilayah Persekutuan ("the PTG") resulted in the following:

4.1 Pengerusi mencadangkan supaya pihak JKPTG memberi pertimbangan sesuatu jaminan mengenai pengeluaran hakmilik strata kepada KPKT demi kepentingan-kepentingan pembeli.

4.2 Pengerusi meminta supaya pemaju mengadakan perbincangan baru dengan Menteri NRE dan menyelesaikan isu-isu hakmilik strata ini dalam tempoh sebulan.

4.3 Demi menjaga kepentingan pembeli, Pengerusi telah meminta pemaju mempertimbangkan sesuatu tempoh yang munasabah diberi untuk menyelesaikan masalah hakmilik strata ini dan juga menangguhkan tuntutan bayaran kemajuan.

(e) the parties accepted the above and the respondent stated:

3.2.3. Pihak pemaju mencadangkan supaya projek perumahan Kiara Hills ini dibenarkan sementara menunggu pindaan Seksyen 6, AHS yang akan mengambilkira hak-hak dan kepentingan pembeli sedia ada.

3.2.4. Pihak pemaju menerangkan bahawa proses permohonan hakmilik strata masih "premature". Sekiranya pengeluaran hakmilik strata tidak dapat diberi kemudian, pembeli-pembeli masih mempunyai hak-hak yang sah termaktub di dalam Perjanjian Jual dan Beli;

(f) notwithstanding the above, the respondent terminated the sale and purchase agreement of 29 July 2004 on the grounds the appellant had failed to pay the balance purchase price in accordance with the terms and conditions of the said agreement and on account of the breach forfeited the deposit of RM446,405;

(g) the issues put before the High Court were:

(i) whether the sale and purchase agreement dated 29 July 2004 of the bungalow should be in sch. G or sch. H under the reg. 11(1) of the said regulations;

(ii) whether the notices of terminations dated 6 February 2006 and 27 February 2006 respectively and the forfeiture of the deposit paid by the appellant to the respondent under the sale and purchase agreement dated 29 July 2004 are valid;

(iii) whether the subject property under the sale and purchase agreement dated 19 July 2004 is in accordance with the development order; and

(iv) whether the issuance of strata title by the defendant in 2009 has made the sale and purchase agreement dated 29 July 2004 to be valid.

The Submissions For Appellant

[7] We took into consideration the submissions for the appellant before this court that "the question for this Honourable Court to consider, which the learned High Court Judge failed to appreciate and give due consideration" under the following headings:

(a) Whether the learned judge were (sic) correct when [she] decided that the use of sch. H agreement is not illegal or void;

(b) Whether the learned judge was correct when decided that termination of the sale and purchase agreement and forfeiture of the deposit by the respondent is valid;

(c) The development order (DO) has no mention of "stratified bungalow" and all it says is "88 unit rumah banglo dua tingkat";

(d) Whether the appellant's claim against the respondent is not *bona fide*; and

(e) Whether issuance of the strata title as of date, makes the sale and purchase agreement become valid.

The Submissions For The Respondent

[8] We took into consideration the respondent's summing up of the appellant's claim in the High Court, and the respondent's submissions before this court, as follows:

(a) On the respondent's defence:

(i) the appellant was at all times aware that Kiara Hills was a stratified development and that her husband, Gerard Jude Timothy Pereira ("Gerard") who had conceptualised Kiara Hills as a stratified housing development;

(ii) Gerard purchased Lot 16 of the Kiara Hills development in the appellant's name in order to capitalise on the 5% Bumi discount, on top of a further 5% discount given to Gerard;

(iii) the appellant was previously employed as a secretary in Messrs Wilson Wong & Tan as well as in Messrs David Lingam & Co, the solicitors who handled the execution of the sale and purchase agreement between the appellant and the respondent;

(iv) the sale and purchase agreement was in Form H as it accords purchasers with the benefits and protection under the Strata Titles Act 1985;

(v) the respondent had exercised its right to terminate the sale and purchase agreement and to forfeit the appellant's deposit together with outstanding interest in accordance with the sale and purchase agreement due to the appellant's breach of the sale and purchase agreement when she failed, neglected and/or refused to pay the progressive payments due to the respondent despite repeated reminders; and

(vi) in accordance with the sale and purchase agreement executed between the parties, the appellant's claim was premature, wrong in law and obviously unsustainable as the obligation on the part of the respondent to apply for the individual strata titles had not arisen and would only arise six months after the certificate of fitness for occupation is issued;

(b) Reliance upon *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77; [1992] 1 MLJ 1 SC and *Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat* [1978] 1 LNS 15; [1979] 1 MLJ 23 FC that appellate courts would be slow to intervene in findings of fact by a trial judge based upon assessment of credibility of witnesses who the trial judge has the opportunity to see and hear, and in the exercise of discretion unless the "court below has clearly acted on some wrong principle, committed some error of law or failed to consider matters which demanded consideration" respectively;

(c) That the appellant had amended the original claim by deleting a sixth plaintiff;

(d) That the second, third, fourth and fifth plaintiffs had withdrawn from the civil suit prior to the filing of the defence;

(e) That the appellant is a nominal plaintiff because:

(i) the order for security for costs made on 17 January 2008 under O. 23 r. 1 Rules of the High Court 1980 was applied for and granted on the ground that the appellant is a nominal plaintiff suing for the benefit of her husband, Gerard Jude Timothy Pereira;

(ii) during cross-examination she admitted that it was her husband's money and that it was her husband who had in fact paid for the property;

(iii) her husband confirmed that it was he who paid for the deposit and progressive payments for the purchase of Lot 16, and that he bought the property in the appellant's name to capitalise from the 5% Bumi discount;

(iv) that it was her husband who first mooted and conceptualised Kiara Hills as a stratified development and was confirmed by:

(1) DW2, Senior General Manager Sales & Marketing;

(2) DW3, the architect in charge of the Kiara Hills development;

(3) DW4, whose firm handled the sale and purchase agreement for Kiara Hills;

(f) That the civil suit by the appellant was filed in April 2006 right after the appellant's husband's company Syarikat Perumahan Sunshine Sdn Bhd was terminated as the sole property agent for Kiara Hills on 14 February 2006 by the respondent;

(g) That the appellant and her husband were aware even prior to the time of the signing of the sale and purchase agreement that the Kiara Hills development was a stratified development;

(h) That the appellant's assertion that she did not have the benefit of independent legal advice prior to the entering into the Form H agreement was untrue:

(i) during cross-examination, the appellant agreed that she did not see nor speak to anyone from Sunway prior to entering into the contract and therefore no one from the respondent made the representations to her;

(ii) she agreed she did not enter into the sale and purchase agreement due to any representation by the respondent;

(iii) her husband said in cross-examination that the representations were all from brochures of the development;

(iv) she agreed that if any representations were made which induced her to enter into the sale and purchase agreement, it would have been made by her husband, Gerard;

(i) That notwithstanding that the respondent had informed the appellant *via* letter dated 6 February 2006 that the payment was overdue and gave her 14 days to make all necessary payments, the appellant failed to make payment;

(j) Reliance upon *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd* [2005] 2 CLJ 596; [2005] 3 MLJ 585 that the obligation to pay is a fundamental obligation, and the appellant's failure to pay entitled the respondent to terminate the agreement and forfeit the deposit;

(k) That the purported decision by the meeting on 14 November 2005 was in fact merely a recommendation;

(l) That only if the respondent failed to comply with cl. 11 of the sale and purchase agreement to submit application for separate strata title or if the issuance of a strata title is refused, then only a cause of action arises against the respondent.

The Regulations

[9] We examined the said regulations.

[10] The sale and purchase took place on 29 July 2004. At the time reg. 11(1) of the said Regulations provided that:

> (1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.

[11] It was amended by the Housing Development (Control and Licensing) (Amendment) Regulations 2007 (P.U.(A)395/07) to the present form:

> (1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H.

[12] Taking the facts and the submissions into consideration as a whole, we observed that although the defence was that the development was a stratified development, it was an agreed fact between the parties that:

> 4. Defendan memajukan Tanah tersebut sebagai sebahagian projek perumahan yang dikenali sebagai KIARA HILLS yang meliputi rumah-rumah banglo dan berhalaman (courtyard).

5. Pada 29.07.04, Defendan telah memasuki Perjanjian Jual Beli di bawah "Schedule H" Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ("HDA") dengan Plaintif Pertama untuk menjual satu unit banglo di KIARA HILLS, iaitu Lot 16 bersama-sama dengan Parsel Aksesori ACP No. 16 hartanah tersebut") kepada Plaintif Pertama.

[13] Quite clearly the correct sale and purchase agreement in the circumstances of a bungalow with courtyard would have been in Form G, and not Form H. The wrong form was used.

[14] The direct and precise issue is, therefore, the effect of the contravention of reg. 11(1).

Contravention Of Regulations

[15] The then applicable sub-reg. (1) was worded in mandatory language as to the form to be used. Effectively, the terms set out in the respective forms were the terms sanctioned by the regulations for each type of sale and purchase agreement and to be addressed in such agreement. Further, the pre-amended general reg. 13 as to penalties would apply where there is any contravention of the said regulations:

(1) Any person who contravenes any of the provisions of these said Regulations shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to a term of imprisonment not exceeding three years or to both.

[16] We addressed our consideration to the question that this poses: whether a sale and purchase agreement in Form H, when it should have been in Form G, renders the sale and purchase agreement in Form H (a) null and void or alternatively (b) voidable at the option of the appellant.

[17] We bear in mind this was not a case of a form other than Form G or Form H being used, but there was use of the wrong form. Even if neither Form G nor Form H was used, contravention merely subjects the contravener to the penalty of a fine under reg. 13. Nowhere in the said Act or the said regulations is it declared that a contravention of the regulations by the use of the wrong form, thereby attracting a fine, renders the sale and purchase agreement under the wrong form to be null and void.

[18] Moreover, the said regulations was made by the Minister pursuant to the power given under s. 24 of the said Act. Section 24 gave discretion to the Minister to make regulations for the purpose of carrying into effect the provisions of the said Act, and in particular and without prejudice to the generality of that power to, *inter alia*:

(c) prescribe the form or forms of contracts which shall be used by a licensed housing developer, his agent, nominee or purchaser both as a condition of the grant of a licence under this Act or otherwise;

[19] The purpose of the said Act is stated to be to provide for the control and licensing of the business of housing development in Peninsular Malaysia and for matters connected therewith. A perusal of the said Act shows that the provisions are as to licensing and control of housing developers and developments for the protection of purchasers. The provisions are designed to protect the purchaser and to ensure delivery of the house or unit contracted for. To render the contract between the parties null and void because of a contravention of the said regulations, does not serve that object of protecting the purchaser and ensuring delivery of the house or unit in accordance with the contract.

[20] The question turns upon the distinction between unlawful and illegal. Adding to the problem is that the two words unlawful and illegal are often used interchangeably. It brings to mind *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC. In that case, it was held that the second order by the court, even though sealed but in breach of s. 13 of the Malay Reservations Enactment 1933, was an order that was in breach of the provisions of written law, and since the court has no power to make an order in breach of the provisions of written law, the second order was illegal and utterly void. In *CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd* [2014] 9 CLJ 1012 FC, it was reiterated that unless the order is a nullity in the sense as enunciated in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysia Finance* (*supra*) it could not be attacked.

[21] In this case, use of Form H instead of Form G was a contravention as to the form of sale and purchase agreement to be used for the contract between the parties for the sale and purchase of the Lot 16 bungalow and courtyard property. The contravention did not go to the substance of the contract. The mandatory language of reg. 11(1) prescribing the use of Form G or Form H did not extend to declaring that the contract under any form other than Form G or Form H to be null and void. Indeed, s. 22 of the Malay Reservations Enactment 1933 provides that a contract is not voidable because it was caused by a mistake as to any law in force in Malaysia, as would be the case if the use of the wrong form is a mistake as to the law in force.

[22] We concluded that since the contravention as to the form to be used does not affect the object of the contract between the parties, being the delivery of a bungalow with courtyard on Lot 16 as contracted, the contravention did not render the contract between the parties to be null and void.

[23] That the contravention renders the contract voidable, although prayed for as an alternative order, is largely academic for the reason there is no evidence adduced and not objected to that the appellant had terminated the Form H agreement on that ground. The appellant's solicitor's letter of

20 February 2006, replying to the respondent's, notice of termination sought reconsideration. If there had been a prior termination by the appellant, one would expect it to be disclosed or raised in the reply.

Appellant's Failure Or Refusal To Pay

[24] Since in any sale and purchase payment is a fundamental term, failure or refusal to make the payments as agreed is always a serious issue.

[25] We observed there are, as pleaded and submitted, differences in the terms between Form G and Form H. But those differences arise from inherent differences between purchase of a landed property and a strata unit. But effectively as between the parties in this case, the particular property being sold and purchased, ie, a bungalow with a courtyard as described, the price, the payment of deposit and of progress payments according to a schedule would not have been different. What was purchased did not become another merely because the wrong form was used.

[26] We also observed that when the bungalow with courtyard was completed, the only document of title that could be issued would in any case be that which is in accordance with the law. That the respondent produced the usual document of title for a bungalow with courtyard in accordance with the law instead of a strata title is hardly any ground of complaint of breach of contract, for the purchase was of the bungalow with courtyard and not the document of title itself. What is the form of the relevant document of title for the Lot 16 bungalow with courtyard is immaterial.

[27] The appellant's argument was, as summed up in her letter of 5 October 2005, as follows:

> 2. I note that the sale and purchase agreement that I have signed is a Schedule H Agreement as provided under the Housing Development (Control and Licensing) Regulation 1989 which is meant for building intended for sub-division.
>
> 3. I know that the Property that I have purchased which is a bungalow consist of building and land. I further believe that it is not your intention to subdivide the building which I have purchased above in order to procure separate strata titles for each parcel. However, I note that pursuant to Clause 11(1) of the sale and purchase agreement, it is your obligation to procure the strata title by way of sub-diving (sic) the building that I have purchased contrary to my belief above.
>
> 4. I further note that from the provisions of the Housing Development (Control and Licensing) Regulations 1989, for any purchase of land and building which is my case herein, Schedule G Sale and Purchase agreement is to be used.
>
> 5. ...

[28] Although the loan solicitors may have questioned whether a strata title could be issued, the issue was the description of the title, but not failure of the security itself. The bungalow with courtyard as contracted would have the same value regardless of the form of the document of title by which it was held.

[29] We observed that paras. 7 and 8 of the appellant's letter dated 5 October 2005 betrays that the non-payment did not result from the bank or its loan solicitor's concerns about the security, but it was the appellant who stopped the processing of loan documents:

> 7. In the circumstances and in order to enable all parties to move forward without any hitches, or problems in future, I will require that you revert to me immediately with your reply to address the issues and my concerns raised above. Pending your reply, I have instructed the solicitors attending to my loan to hold the processing of loan documents in abeyance and my financier will be notified of the above.
>
> 8. Kindly take note that once all the issues and my concerns above are addressed to my satisfaction, I will instruct my financiers to immediately complete all loan documents and release all the principle (sic) sum due to you provided that you have forwarded your written confirmation to me that you are agreeable to the total waiver of all interest on late payment chargeable then.

[30] Likewise, the pleadings show that it was primarily the appellant's purported concern about the document of title that was the ground for not making payment. In our view, if the ground relied upon for the purported concern is not well-founded, then the appellant had no good reason for her failure or refusal to make payment and the termination and forfeiture would be justified in law.

[31] The obvious solutions when the wrong form is used and pointed out by the appellant's loan solicitors are either (a) the appellant seeks to terminate the Form H agreement and demand a refund, or (b) to execute an agreement in the correct form and to backdate its date of effectiveness to the 29 July 2004, since payments had been paid.

[32] It was pleaded at para. 18 of the amended statement of claim that:

> The Plaintiffs' solicitors were in communication with the Defendant and/or their agents and/or their solicitors to try and resolve this matter amicably. This failed and the agreement of one of the Plaintiffs was terminated and monies forfeited and the remainder returned on the 15.4.06.

[33] If the parties could not come to an agreement on the latter, the appellant was obviously left with no choice but to seek to terminate the form H agreement and demand full refund.

[34] We observed that the appellant did neither. A final reminder to pay progressive payment was issued 30 September 2005. The respondent's letter of 29 November 2005 had made clear the concern that the respondent would be able to discharge its contractual obligations, was being attended to. The 9 February 2006 letter from the Ministry of Housing and Local Government to the appellant was not only explicit and confirmed that amendments were being made, but also that the respondent needed to make application for issue of strata title only within six months after the certificate of fitness for occupation was obtained. That had not yet occurred. Her concerns then were, therefore, premature as the time for seeking issue of the title had not arrived. Instead, the appellant had failed or refused to make further payments.

[35] Considering the facts as a whole, this was a case where the respondent proceeded to sell a bungalow with courtyard under a stratified development before the law had provision for such title. It was the early days of the gated community concept, a horizontal adaptation of the vertical strata development. The appellant was a nominee buyer for her husband who knew of that. The Form H was signed before the law was amended. But even after receiving a direct assurance from the Ministry of Housing and Local Government that the law was being amended to allow for the issue of stratified title for the bungalow with courtyard as contracted, the appellant continued to maintain her purported concern, giving notice she would take legal action without offering to make the instalment payments. We note that the requisite titles had been issued in accordance with the agreement in Form H.

[36] The notices of termination were dated 6 February 2006 and 27 February 2006. The letter from the Ministry of Housing and Local Government was dated 9 February 2006. What was a premature concern, became an academic concern from 9 February 2006. That the appellant had not at any time after 9 February 2006 attempted to tender payments *albeit* belatedly, but instead issued a solicitor's letter dated 20 February 2006 giving notice to take legal action for the termination inexorably led to be askant whether the present case is painstakingly maintained, not for the delivery of the bungalow with courtyard as purchased, but was against the forfeiture of the deposit, and for good measure damages.

[37] Accordingly, we dismissed the appeal with costs in the sum of RM10,000 and ordered deposit to be to account of costs. We made the further order that the balance of security for costs to be refunded.